

# More Suffocating Bonds?! Conceptual and Legal Flaws of the Unnecessary Proposal

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In this brief contribution I turn to Kostakopoulou's text and briefly show that her proposal: 1) ignores the core aspects of EU citizenship's added value; 2) is entirely unnecessary; 3) is not legally neat; and 4) is dangerous for the very nature of EU citizenship today as it essentially pleads for the recreation of the 'suffocating bonds' the EU was created to ease, only at a scale much more scary than Greece, Ireland or France, when taken one by one. Besides, it ignores every single outstanding problem actually posed by EU citizenship law as it stands.

## Ignoring the main value of EU citizenship

Kostakopoulou's proposal strikes me as empty: unnecessary, not worked out, and potentially harmful. I thus join the majority of other commentators in feeling obliged to dismiss it. Its underlying aim, even if not directly stated, emerges as the replication of the suffocating bonds at the supranational level in a Union that was created with one core idea in mind: to tone down liberal nationalisms and make the individual emerge as a beneficiary of rights deriving directly from EU law, more than a hostage of the politics distributing the statuses of belonging.<sup>1</sup>W. Kymlicka, "Liberal Nationalism and Cosmopolitan Justice", in S. Benhabib, *Another Cosmopolitanism* (Oxford, 2006), 134. The core aspect of EU citizenship is that it is the *natural enemy number one* of the nationalities of the Member States, in that it simply switches them off within the scope of application of EU law as a result of the application of non-discrimination on the basis of nationality. It turns Member States' aspirations to control the composition of their populations – a right any other sovereign state claims to enjoy around the world – into an even bigger fiction, since free movement across the Union borders is a directly enforceable right. Even more, although derivative from the Member States' nationalities, EU citizenship, in fact, has significant implications for the distribution and functioning of the national-level statuses: *Boukhalfa* prohibits discrimination on the basis of the grounds of acquisition of a nationality, *Micheletti* prohibits the testing of the suffocating bonds with other states, and *Rottmann* outlaws arbitrariness in the removal of nationality (at least EU-law-significant arbitrariness). The circle is rounded up: the supranational status already necessarily affects core approaches to the essence of nationality in the Member States.<sup>2</sup>D. Kochenov, "Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship", *EUI Working Paper RSCAS No 2010/23*, 2010 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1577984&download=yes](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1577984&download=yes)>. Unlike any status of tying a person to the imaginary 'society' through 'residence' (even if a Bangladeshi naturalizes in a Bangladeshi ghetto in an EU capital) EU citizenship, instead,

*decouples*. Indeed, it is the only citizenship in the world with the core directly enforceable right to leave the state that claims you as a national.<sup>3)</sup>A. #azowski, “‘Darling You Are Going Nowhere’: The Right to Exit in EU Law”, 40 *ELRev.* (2015), 877. It is citizenship that liberates you from the obligation to conform to the linguistic, cultural, and other clichés and is based, essentially, on *difference*, elevated to a sacred right.

This is only possible due to the fundamental decoupling of the competence to distribute the status, which guarantees both EU citizenship’s fascinating nature of an empowering ‘anti-citizenship’ of sorts – a protector of the claims to belong based on the denial of the very rationale behind the *need* to belong – and, secondly, the most ironical legal pluralism of access to the status, only possible through essentially false claims of the Member States of being in control, as I have demonstrated with Lindeboom.<sup>4)</sup>D. Kochenov and J. Lindeboom, “Pluralism through Its Denial: The Success of EU Citizenship”, M. Avbelj and G. Davies (eds), *Handbook on Legal Pluralism in the EU* (Edward Elgar, 2018) <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3099099](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3099099)>. Both these aspects are fundamentally precious and both are overlooked and potentially undermined by Kostakopoulou’s suggestions. Once able to confer its own status, the EU will be bound to make the clichés of EU citizenship explicit – and Kostakopoulou already suggests ‘residence’ – damaging the status and depriving it of the core added value.

## Offering to solve no problem

Kostakopoulou mentions several potential vulnerable groups to benefit from a direct conferral of EU citizenship, some of them real, but the majority imaginary, and fails to explain why the decoupling of EU citizenship and Member State nationality would at all be necessary. Fighting statelessness is not an argument, since the EU is not a state and anyone with an EU citizenship will remain stateless. Ensuring that children of EU citizens exercising free movement do not end up without a nationality is not an argument either, since EU law will have to step in – *à la Rottmann* – prohibiting Member States from punishing the children of those who exercise their main citizenship right, an example Gerard-René de Groot and many other colleagues discussed in detail since the times of Maastricht.<sup>5)</sup>G.-R. de Groot, “Towards European Nationality Law”, 8 *Electronic Journal of Comparative Law* (2004) <<https://www.ejcl.org/83/art83-4.html>>. Brexit is a wrong pretext too: tying British people to the EU ignoring the sovereign decision of their Member State taken democratically smells like tyranny, as I explain with van den Brink in detail in a forthcoming *JCMS* article.<sup>6)</sup>M. van den Brink and D. Kochenov, “Against Associate EU Citizenship”, 57 *JCMS* (2019, forthcoming) <draft available: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3175318](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3175318)>.

Lastly, the third country nationals who reside in the EU for long enough a time could objectively benefit from a significant improvement of their status. In disagreement with Acosta Arcarazo, I submit that the relevant Directive failed to establish a status similar in any way to EU citizenship.<sup>7)</sup>D. Acosta Arcarazo, “Civic Citizenship

Reintroduced?”, 21 *ELJ* (2015), 200. It is not this failure, however, which is a problem – after all, not so much depends on this legal status *per se*, as Thym rightly underlines in his contribution – but the fact that unlike any other constitutional system in the world, the EU does not even pretend to offer its law and the opportunities of the internal market to the majority of third-country nationals, who are confined to individual states.<sup>8)</sup> D. Kochenov and M. van den Brink, “Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU”, in D. Thym and M. Zoetewij Turhan (eds), *Degrees of Free Movement and Citizenship* (Martinus Nijhoff, 2015), 66. Solving the problem of opening up the internal market to third-country nationals is a matter of amending the Directive, however – no complete reshuffling of the Treaties will be needed for this. The proposal uses an impossible sledgehammer to crack a microscopic nut. As we have seen, the absolute majority of the problems it purports to solve are imaginary, while the last remaining one does not require, *per se*, a separate supranational citizenship solution. Thinking about Europe’s future, one could be inspired by Paul-Henri Spaak in charting the paths for change: idealistic reforms leading nowhere, however well-intentioned, can – and shall – harm the cause of European integration. Solution to no problem, Kostakopoulou’s submission is in this category.

## Failing to rely on the law as it stands

It is very good that Kostakopoulou does not explain how to put the unnecessary proposal in practice, since the answer, quite obviously, is that it is impossible without amending the Treaties. Sarmiento has most recently explained in great detail why the EU is not empowered to regulate the main bulk of nationality-related matters, including the introduction of the status.<sup>9)</sup> D. Sarmiento, “EU Competence and the Attribution of Nationality in the Member States”, *Investment Migration Research Papers* no. 2019/2, 2019 <<https://investmentmigration.org/download/eu-competence-attribution-nationality-member-states-imc-rp-2019-2>>. In essence, given that the need for the proposed change is not explained to us and the mechanisms are left out in the open, it would be difficult to agree, at the bottom line, that there is a proposal at all. Nothing legally doable is proposed for no reason at all. The picture is a bit more complicated than that, however, as the ‘proposal’ is bound to contradict the Treaties quite a bit even beyond the main *ius tractum* rationale of the independent supranational status.<sup>10)</sup> D. Kochenov, “Ius Tractum of Many Faces”, 15 *CJEL* (2009), 169 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1352734](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1352734)>. This is due to the fact that an independent supranational status is inescapably but the first step to an *outright replacement* of the Member States’ nationalities: spill-over logic ensures that if the Union can bite off a finger, it will. Put otherwise, what is suggested – in the medium-term run – is the abolition of the Member States and, thus depriving the project of EU integration of added value – there is no interest in benefitting from free movement if what you find on the other side of the border is the same as at home. And without citizenship not much is left of states of course.

Ignoring the federal bargain, analyzed by Nic Shuibhne so well, is deeply problematic.<sup>11)</sup> N. Nic Shuibhne, “Recasting EU Citizenship as Federal Citizenship”,

in D. Kochenov (ed.), *EU Citizenship and Federalism* (Cambridge, 2017), 147.  
[The 'proposal' is not merely insensitive to the current division of competences in the citizenship field. It is entirely silent on all the law at play. Silence is not a wise approach, with respect, should the crowd targeted by preaching not be composed uniquely of those already converted.]

At issue, ultimately, is the Member States' ability to regulate, full stop. I am not a proponent of the wholly internal situations as currently construed.<sup>12)</sup>A. Tryfonidou, *Reverse Discrimination in EC Law* (Kluwer Law International, 2009). They are, however, the law of the land as it stands. Consequently, the implications of the separation between the nationalities of the Member States and EU citizenship for this aspect of EU law have to be considered. This is important, in particular, since only the nationalities of the Member States in combination with no cross-border element can result in a situation where national law, rather than EU law available on the issue, applies. I have claimed that this is one of the core legally-significant aspects of Member State nationalities in the current EU: they allow states to lawfully mistreat (treating better would be prohibited by EU law) huge chunks of people.<sup>13)</sup>Kochenov, "Rounding up", op. cit. The absence of local nationality means, presumably, the absence of wholly internal situations for that person, which automatically shifts the main bulk of the law applicable to the situation of 'pure' EU citizens to the supranational register, turning national law into a redundancy. One might be happy about this, but cannot be happy silently: visceral opposition of the Masters of the Treaties is to be expected. More supranational regulation is not a problem *per se*, besides the fact that when the difference in regulation is lost, some Europeans will feel that their state, which is already prohibited from treating them better than EU foreigners in many vital aspects of life – represents them even less.

The EU lacking its own territory properly speaking (going beyond the sum of the territories of the Member States as per Article 52 TEU) will be obliged to *assign* the 'pure Europeans' to particular state anyway, should they enjoy any right of residence. Given that an absolute right to reside does not exist and free movement is subject to legal limitations that have to be respected,<sup>14)</sup>D. Carter and M. Jesse, "The *Dano* Evolution': Assessing Legal Integration and Access to Social Benefits for EU Citizens", 4 *European Papers* (2018). what is likely to emerge is a *quasi*-nationality of a Member State anyway. Given that the Member States will not accept that their own nationals are subjected to more limitations in the EU than the nationals of no Member State as per the 'proposal', 'pure Europeans' will either never emerge in practice, or be treated as markedly second rate inhabitants of the EU. Even worse, of course, is that they will be stateless in the eyes of the rest of the world, unless Kostakopoulou has a plan to negotiate the acceptance of this status by Putin and Trump administrations (among almost 200 others), giving necessary concessions for the requested gestures of good will.

## Ignoring all real problems

What is a pity, is that the 'proposal' does not engage with the core problems of EU citizenship, some of which have been outlined by Kostakopoulou in her earlier

work. It is a problem that EU citizens can become unwelcome, when they belong to minorities and are destitute, like Miss Dano;<sup>15)</sup> D. Schiek, “Perspectives on Social Citizenship in the EU”, in D. Kochenov (ed.), *EU Citizenship and Federalism* (Cambridge, 2017) 341. it is a problem when EU citizens become *de facto* foreigners when they commit a crime, however non-dangerous for the society;<sup>16)</sup> D. Kostakopoulou, “When EU Citizens Become Foreigners”, 20 *ELJ* (2014), 447. it is a problem that the rules of the delimitation of the scopes of the law are based on personal histories of employment and cross-border movement and are thus purely personalised and neo-Mediaeval, instead of being rooted in the equality before the law based on the status of EU citizenship as such;<sup>17)</sup> D. Kochenov, “Neo-Mediaeval Permutations of Personhood in the European Union”, in L. Azoulay, S. Barbou des Places and E. Pataut (eds), *Constructing the Person: Rights, Roles, Identities in EU Law* (Hart, 2016), 133 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2760968](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2760968)>. it is a problem that fundamental rights seem to be not part of the EU citizenship package in all cases; it is, finally, a problem that the EU emerges as a powerful actor of injustice in the eyes of thousands of those who are let down by its law.<sup>18)</sup> C. O’Brien, *Unity in Adversity* (Hart, 2017). The arcane legalistic explanations why the law is what it is do not save the situation. It is a problem that some of the core assumptions underlying Union law are not based on any ethical or moral imperative – that EU law is ‘the law of taking a bus’;<sup>19)</sup> D. Kochenov, “On Tiles and Pillars: EU Citizenship as a Federal Denominator in Europe”, in D. Kochenov (ed.), *EU Citizenship and Federalism* (Cambridge, 2017) 3 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2963861](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2963861)>. where your employability or willingness to travel activates the protection of rights, not a fundamental legal status as such. All these core issues are not touched upon either by Bellamy or Kostakopoulou when discussing the possible innovations so huge, that they are virtually impossible. The whole conversation emerges as sterile in that it does not mention a single significant socio-legal problem that the EU and its citizenship happen to be facing.

## A ‘proposal’ coming down to an aesthetically-displeasing word?

All in all, the ‘proposal’ tells us that EU citizenship separated from the nationalities is something new, while potentially replicating precisely what the EU was needed to liberate the Member States’ citizens from. It is about ‘suffocating bonds’: more of those and now in scale. It is thus good news that these are both unnecessary, since they will not solve any problems, as we have seen – and pretty much impossible, legally speaking, while steering clear of all the core problems of EU citizenship law. In essence, what has been proposed comes down to an unutterable word, which I will not replicate here. Much more could be expected of ‘courageous proposals’: we clearly do not need this word.

## References

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